

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1226

To be argued by
JO ANN HARRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1226

UNITED STATES OF AMERICA,

Appellee,

—v.—

HAROLD LANE,

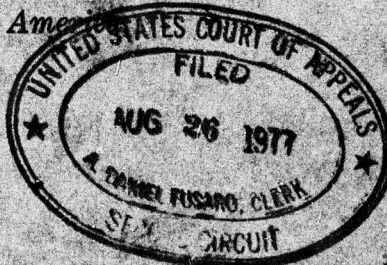
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America*

JO ANN HARRIS,
AUDREY STRAUSS,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*



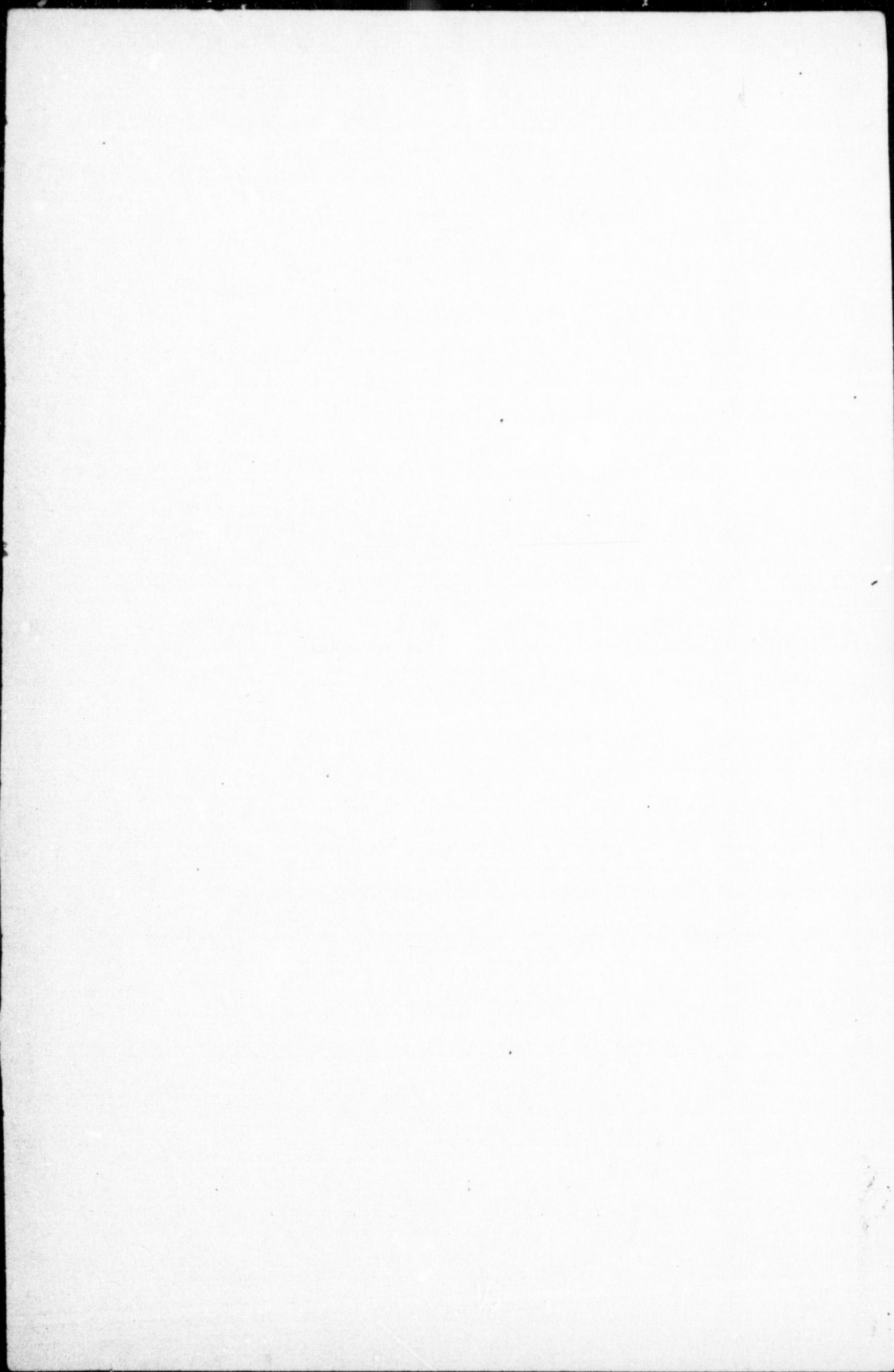


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UNITED STATES OF AMERICA,

Appellee,

—v.—

HAROLD LANE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harold Lane appeals from a judgment of conviction entered on March 25, 1977, in the United States District Court for the Southern District of New York, after a two and one-half week trial before the Honorable Charles S. Haight, Jr., United States District Judge, and a jury.

Indictment 76 Cr. 879, filed on September 8, 1976, charged Lane with embezzling \$1,067,000 from the United States Food Stamp Program, in violation of Title 18, United States Code, Section 641 (Count 1); with filing 22 false statements in connection with his food stamp business, in violation of Title 18, United States Code, Section 1001 (Counts 2-23); and with attempting to evade federal income taxes for 1972, 1973 and 1974, in violation of Title 26, United States Code, Section 7201 (Counts 24-26).

Trial commenced on January 17, 1977. On February 2, 1977, the jury found Lane guilty on each of the 26 counts in the Indictment.

On March 25, 1977, Lane was sentenced to a term of four years' imprisonment on each of the 26 counts in the Indictment, each term to be served concurrently, and in addition a \$10,000 committed fine on Count 1. Execution of sentence was stayed and Lane is presently free on bail pending appeal.

Statement of Facts

A. The Government's Case

Introduction

At the close of 1971, Harold Lane was a young Westchester County entrepreneur with an unremarkable net worth of \$36,588. (GA 27 [GX 140]).* Chief among his assets were three pieces of real estate acquired in 1969, 1970 and 1971 for a total purchase price of \$124,000 (GA 28 [GX 141]); and a capital investment of \$5,000 in each of two of his corporations, Chester Hill Enterprises, Inc. (a real estate business) and Lane Check Cashing, Inc. (a check cashing operation which in 1973 was to be authorized to sell United States Food Stamps). (GA 30 [GX 143]). He had just launched a third corporation, GSC of Westchester, Inc. (a collection agency). (Tr. 979; 1010-11). Lane was president and sole shareholder of each corporation. (Tr. 982). A modest 1970 Grand Prix Pontiac and a 1970 Ford Mustang graced his garage. (GA 29 [GX 142]).

* Citations preceded by "GA" are to the Government's Appendix; by "A" are to the Appellant's Appendix. Citations preceded by "Tr." are to the trial transcript. "GX" stands for Government Exhibit.

He dutifully filed his personal federal income tax return for 1971, as he had done for some years past. (Tr. 1071). It called for a refund of \$1,143. (Tr. 1426-27).

By the end of 1972, Lane's net worth had almost doubled, to \$68,036. It climbed to \$149,806 by the 1973 year-end. (GA 27 [GX 140]). His own calculation of net worth during 1974 was \$303,000 (Tr. 1065-66), and it was \$266,000 in 1975. (Tr. 1066).^{*} By the end of 1975, Lane was the president and sole shareholder of at least eight corporations. (Tr. 978-82).

Although Lane filed a few tax returns for his burgeoning list of wholly-owned corporations for 1972, 1973 and 1974 (Tr. 1076-87), he filed no personal tax returns for those years. (Tr. 1074-75).^{**} His taxable personal income was: 1972—\$36,793; 1973—\$83,358; 1974—\$318,211. (GA 39 [GX 151]). In 1975 he was driving automobiles commensurate with his new status, a 1975 El Dorado Cadillac (purchase price \$10,967) and a 1975 Mercedes 280 Coupe (\$13,440). (Tr. 1253-54, 1368).

^{*} The Government relied upon the net worth method of proof to demonstrate taxable income for 1972 and 1973, and the 1972 and 1973 figures are from those calculations. For the tax year 1974, the Government relied on the specific item method of proof, using the \$348,350 related to the food stamp monies embezzlement which was the subject of other counts in the Indictment. Lane's own net worth statements, prepared at his instance by his accountant, contained figures grossly higher than the Government's.

^{**} Similarly, Lane Check Cashing, Inc., the company through which Lane conducted his United States Food Stamp business, failed to file any tax returns after the year ending August 31, 1972. (Tr. 1076-77). This corporation at its inception elected to file a 1120s return which effectively passed through to Lane, personally, the income and tax liability of the corporation. (Tr. 1002).

This case told the story of how and why Lane "prospered" from 1972 through 1975.

1. 1972

Lane Check Cashing, Inc., occupied a one-room office at 70 East Post Road, White Plains, New York. Access to the public was through small slots in bullet-proof windows along the front, which opened to a hallway leading from the main ground floor entrance of the building. (Tr. 195, 197-200). In this cramped office, a cashier worked, selling American Express money orders and cigarettes, cashing social security, welfare and other types of government and payroll checks for the public. (Tr. 201, 204, 552). To satisfy the steady flow of cash required by the check cashing business, in 1972 Lane negotiated an unsecured, revolving loan of from \$5,000-\$50,000 weekly from the National Bank of Westchester. (Tr. 1090-91). He also undertook to gain authorization to distribute United States Food Stamps from his check cashing store. (Tr. 132-34).

Although the source of the funds was not apparent, Lane's corporate tax returns for Chester Hill Enterprises disclosed that he personally loaned the corporation \$11,021 during 1972. (Tr. 1400; GA 30 [GX 143]). The GSC tax return indicated a capital investment from Lane of \$7,500 (Tr. 1398; GA 30 [GX 143]), and a personal loan from Lane of \$6,146. (Tr. 1402; GA 30 [GX 143]). Similarly, Lane Check Cashing's books detailed a personal loan from Lane of \$1,273. (Tr. 1401; GA 30 [GX 143]). In 1972, he added three more real estate parcels to his collection. Mortgaged heavily, their total purchase price was \$99,500. (GA 28, 31 (GX 141, 144)).

2. 1973

Four more buildings joined Lane's holdings in 1973. They, too, carried large mortgages. (GA 28, 31 [GX 141, 144]). The tax return for Chester Hill Enterprises indicated that Lane's personal loans to that corporation increased to \$48,411. (Tr. 1400; GA 30 [GX 143]). Lane Check Cashing's books showed an increase in personal loans from Lane to \$24,761. (Tr. 1401; GA 30 [GX 143]). Lane indicated on the few corporate tax returns he filed for 1973 that he was drawing no monies from his corporations. (Tr. 982). During the year, he deposited a total of \$60,369 into his personal bank account, \$18,291 of it in cash. (Tr. 1097-98).

In early 1973, Lane won approval to sell United States Food Stamps at his store. (Tr. 117-18). The system was not complicated. Every month the Westchester County Department of Social Services distributed an Authorization to Purchase (ATP) card to each eligible recipient within its jurisdiction. (Tr. 42, 113). Preprinted on the card was the face value dollar amount of food stamps the recipient could purchase for a lesser amount of cash predetermined by formula for that particular recipient. (Tr. 43-44). A supply of food stamps of various denominations was shipped to Lane Check Cashing directly from the United States Department of Agriculture. He was required to pay nothing for them. (Tr. 45-47, 130-31).

To effect a food stamp transaction, the recipient took the ATP to Lane's store, paid the amount of cash indicated on the ATP and received food stamps in the greater face value denominations, also indicated on the ATP. The store kept the ATP. (Tr. 47-48). Federal regulations required that all of the cash thus received be deposited in the form of cashiers checks, along with a special deposit ticket, directly and promptly to the Federal

Reserve Bank for credit to the Department of Agriculture, the federal agency administering the food stamp program. (Tr. 48-53). Lane was well aware of these requirements. (Tr. 242-43, 255-56). Lane Check Cashing's legitimate profit was to come at the end of each month when Lane returned the used ATPs to the County of Westchester and was paid \$.55 per food stamp transaction, evidenced by each ATP. (Tr. 54-56; 120-22).

Federal regulations also required Lane Check Cashing to submit to the United States and the County of Westchester a monthly summary report (Form 250) setting forth, among other things, the dates and amounts of deposits of food stamp monies made to the Federal Reserve Bank. (Tr. 56-60, 126).

Although in 1973 Lane was still receiving five day unsecured loans ranging up to \$50,000 from the National Bank of Westchester to handle the voracious appetite for cash generated by the check cashing end of his enterprises, the ready cash created by the food stamp business was used, from the beginning, to supplement that diet. (Tr. 204-05, 216). Throughout 1973, a total of \$37,991 was received by Lane Check Cashing in food stamp money. It was eventually deposited to the Federal Reserve Bank, but not before it was commingled with other cash coming into the business and used, interest-free, for periods ranging up to 10 days. Similarly, Lane was failing to make on-time deliveries of American Express funds generated by the sale of money orders, thus achieving from that company the same type of supplementary interest-free, ready cash for use in his check cashing business. (Tr. 1229-30, 1248-49).

Mattie Grady, Lane's cashier at the beginning, was responsible for preparing the food stamp deposit tickets and the monthly Form 250 reports. Upon completion, she gave these documents to Lane for disposition. Lane, himself, was responsible for purchasing the cashiers checks

at the National Bank of Westchester, and mailing these checks and the related deposit tickets to the Federal Reserve Bank. (Tr. 242-43, 246, 252-60, 264-65). From March through August, Grady signed the Form 250 reports.

At the end of the summer of 1973, Grady refused to sign any more Form 250 reports, and quit after Lane directed her to use inaccurate inventory figures on the food stamp reports. (Tr. 258-60). She was replaced as cashier by Harriet Dollan. However, Lane prevailed upon Grady to come in once a month to prepare the food stamp reports. (Tr. 243-44). Grady did so throughout the remainder of 1973, relying on the ATPs and evidence of deposits made (or not yet made) to prepare the monthly Form 250 reports, and the deposit tickets where necessary. (Tr. 260-69). She left these documents for Lane, who signed the Form 250s and submitted them, and who, eventually, bought the necessary cashier checks at the National Bank of Westchester, and made the necessary deposits to the Federal Reserve Bank. (GA 46 [GX 56]).

Meantime, in 1973 it was business as usual at Lane Check Cashing. And business as usual included an institution known as "Harold's Box," a cigar box that was the repository for the proceeds of cigarette sales and excess check cashing fees which Lane ordered the cashiers to charge customers ("Harold's Dime"). (Tr. 205-09, 517-18). Lane also ordered Grady to destroy the back-up tapes that reflected this price gouging. (Tr. 213-14). Lane periodically emptied the box and took the contents with him. (Tr. 209). Whatever happened to that cash, in no event did it show up on the books and records of the corporation.*

* Needless to say, this cash did not show up on Lane's income tax return which he did not file at all.

In fact, very little if anything on the sparse Lane Check Cashing books and records represented the true nature of the transactions of the corporation. The basic record of the check cashing business was the Daily Transaction Sheet. It was a single sheet of paper containing a preprinted form. The form was completed at the close of each business day, by Lane or the cashier. On one side incoming monies were logged, starting with an opening cash figure. Thereunder, the amount of fresh cash brought in from the bank was entered, followed by a tally of other miscellaneous incoming funds—for example, cash for the sale of money orders. Under that block, the incoming cashed checks were totalled, and subtracted from the cash figure. The total actual cash on hand at the end of the day was then counted and compared with the balance. The balance was carried as the closing cash figure for the day—and entered as the opening cash figure the following day. (Tr. 221-29).

However, the closing and opening cash figure in no way truly reflected the amount of cash on hand. It was grossly inflated by a fluctuating “dummy figure,” another time-honored tradition of Lane’s businesses. The “dummy figure” ostensibly represented the total amount of otherwise unrecorded withdrawals of cash from the safe and cash drawer by Lane, personally. At times, the cashier would see Lane take the cash—at other times, Lane would simply call the cashier and tell her or him to increase the “dummy figure” by the amount he said he had removed. Sometimes the cash was replaced by Lane, sometimes not. (Tr. 229-42, 629-32, 660-62). The net effect was to make it virtually impossible to accurately determine and account for the vast amounts of cash flowing in and out of the business. It also rendered wholly unreliable the books and records of the corporation, which were made, in part, from the Daily Transaction Sheets. (Tr. 267-70). In April there was a surprise on-site audit by the New York State Banking Department that disclosed many irregular-

ities on the face of the corporate books, but failed to uncover the "dummy figure." Lane, disingenuously, promised to do better. (Tr. 1137-40).

3. 1974

In 1974, misfortune appeared, at first glance, to beset Lane and Lane Check Cashing. The American Express Company, having discovered about \$19,000 in money order funds missing during a spot audit in December, and unhappy about Lane's chronic delays in making payments, cancelled its contract with Lane in January 1974. (Tr. 1230).

Then, on March 21, 1974, his White Plains store was robbed, moments after Lane had delivered fresh cash from the bank. The Daily Transaction Sheet for the night before carried a closing cash balance of \$19,472. With the fresh money, it initially appeared to the police that \$23,000 had been taken in that robbery. Harriet Dollan, the cashier, immediately told the police that the \$19,472 amount was phoney, inflated by a "dummy figure" on instructions of Lane, and that in fact the store had closed the night before with a mere \$1,500 actual cash on hand, supplemented that morning by about \$3,500 from the bank, for a total of about \$5,000 stolen. (Tr. 610-14). Detective Austin Avery, his attention captured by the use of the "dummy figure", asked to listen while Dollan reported the robbery to Lane by telephone. Unsuspecting, on the telephone Lane repeatedly told Dollan to report that the phoney total of \$23,000, including the "dummy figure," had been stolen. (Tr. 614-15, 681-82). Detective Avery then took the phone, and Lane repeated to him that \$23,000 was taken. (Tr. 683). Avery asked Lane to meet him at police headquarters after Avery conducted his investigation at the scene of the robbery. At police headquarters, Avery asked Lane the exact amount taken, and they went back to the store,

in Lane's car, where Lane checked the safe and again stated to Avery that \$23,000 was missing. (Tr. 684, 698). On the way back to headquarters, Lane told Avery he wasn't worried because he was covered by \$20,000 insurance. (Tr. 684, 698). Back at headquarters, Avery asked Lane if he would sign a written statement concerning the amount stolen. Lane agreed. After Lane had sworn to the statement claiming the \$23,000 loss, Avery advised him of his rights and told him of the discrepancies between his story and Dollan's. (Tr. 684-85). Lane then attempted to explain, saying that he hadn't meant that \$23,000 in cash was taken, but that most of it was in vouchers left behind when he borrowed money from the cash drawer to use for personal purposes and to pay bills of his other companies, among other things. (Tr. 685-86). Later, Lane filed a claim with his insurance company stating that \$5,300 had been taken in the robbery. (Tr. 731-32; GX 46D).

Also, in March 1974, the National Bank of Westchester cancelled the unsecured operating cash loans to Lane Check Cashing. (Tr. 1091).

Yet, during this year Lane prospered, purchasing five more buildings. (Tr. 1065). He also incorporated two more wholly owned businesses, H. Lane & Sons Realty Corp. and Roblan Realty Corp. (Tr. 981). He managed as well to deposit a total of \$60,396 in his personal bank account, some \$41,000 in cash. (Tr. 1098). Finally, he added three more check cashing stores. Palisades Check Cashing, Inc., in Yonkers opened in the Spring of 1974, the corporation having been acquired by Lane in late 1973. Branches of Lane Check Cashing, Inc. were opened in the fall, one on Riverdale Avenue and the other on Warburton Avenue in Yonkers, adding even more need for liquid operating funds. (Tr. 390-96). This problem was apparently resolved by a personal loan of \$59,000 from Lane to Lane Check Cashing. (Tr. 1141-42). Fur-

ther, Lane Check Cashing in 1974 loaned \$141,788 to Palisades Check Cashing, and \$60,412 to the Riverdale and Warburton branches. (GX 123A).^{*} Lane's earlier loans to Chester Hill Enterprises were increased to \$5,703, but reported to the New York State Banking Department as loans, not from Lane personally, but from Lane Check Cashing. (Tr. 1191).

No detail as to the source of all these funds was apparent in the books and records of Lane's corporations.^{**}

Significantly, however, all of Lane's check cashing stores were in the food stamp business. None of the stores, with the exception of the main office on East Post Road, even attempted to book food stamps sales on the Daily Transaction Sheets kept at each branch. The food stamp money was, instead, segregated with the related ATPs and transported to the East Post Road main office by Lane or one of his employees. There, it was commingled with the East Post Road store cash and used for operating funds. (Tr. 404-10). Cash from the East Post Road store was also loaned back to the other stores in cash emergencies, sometimes accompanied by a record, sometimes not; sometimes transported by Lane himself, sometimes by other employees. (Tr. 415-16, 514-15).

Mattie Grady continued, until the end of the summer of 1974, to come in monthly and to prepare the Form 250 reports and the Federal Reserve Bank deposit tickets from the ATPs assembled from the month's food stamp

^{*} The loan to Palisades did not appear on the books and records of that corporation. (Tr. 1192).

^{**} Another surprise audit by the State Banking examiners of the 1973 and 1974 books produced the same irregularities as the 1973 audit of the 1972 books, including commingling of corporate funds, unposted, inaccurate general ledgers, and a vast discrepancy in the records concerning cash on hand. (Tr. 1192-93).

business. She continued, until the end of the summer, to give the completed Form 250 reports to Lane for signature and for forwarding to the authorities. At the same time, she continued to prepare and give to Lane tickets for the necessary deposits to the Federal Reserve Bank. In August, she gave it up entirely. Thereafter Lane personally did all of the food stamp paper work. (Tr. 246-52, 401-08).

The Form 250 reports, duly signed and submitted monthly by Harold Lane to the United States and the County of Westchester, certified that a total of \$376,170 in food stamp money was deposited with the Federal Reserve Bank by Lane at various times throughout 1974. In fact, only \$28,563 was actually deposited by Lane. (GA 47 [GX 57]). Facilitated by the "dummy figure"—extended, along with "Harold's Dime" and "Harold's Box" to all the other stores—and the churning of cash from store to store, the remaining \$350,000 of food stamp monies simply disappeared, while Harold Lane's personal fortune expanded without visible source in all directions. (Tr. 412-15, 451, 464-67, 471-74, 514-20).

4. 1975

Beginning in 1975, any pretense of making or keeping accurate records was dropped altogether by Lane. Even though he personally assured the New York State Banking Department in April and again in May that he would keep better records in the future (Tr. 1146-47), in January he had, in fact, ordered Lewis Roper, his second in command, to stop making Daily Transaction Sheets of any kind at the central East Post Road store. (Tr. 418-22).

During this year from January through October, a total of \$711,380.25 in food stamp money was taken-in and spun-out at the central East Post Road office without a record—indeed, without a trace. On the monthly Form

250 reports that Lane continued personally to prepare, sign and submit to government agencies, he certified that he forwarded all \$711,380.25 of it in 65 separate deposits to the Federal Reserve Bank. (Tr. 246-52, 401-08). In fact, not one dime of it was ever deposited. (GA 48 [GX 58]).*

Lane did, however, in 1975, manage to deposit some \$250,072 into his personal bank account, \$55,950 in cash. (Tr. 1099). Furthermore, his largess with his other corporations continued to grow. His personal financial statement dated May 31, 1975, indicated "advances" to Lane Check Cashing in the amount of \$15,000; Palisades Check Cashing, \$10,000; Chester Hill, \$20,000; Roblan Realty, \$50,000; and H. Lane & Sons Realty, \$25,000. Apparently in addition to those personal loans, he placed a \$5,000 capital investment in both Roblan Realty and in H. Lane & Sons Realty. (GX 114).

Then, on November 13, 1975, Cynthia Schaller, Department of Agriculture Food and Nutrition Service Auditor, walked into Lane's offices and into his life. Having noticed simple mathematical errors on Lane's Form 250 reports, she merely asked to review his food stamp records. (Tr. 817-19). When the dust had cleared, the final toll was \$1,067,000 in food stamp monies received by Lane Check Cashing, certified as deposited by Lane in twenty-two separate Form 250s, and never sent to the Federal Reserve Bank for credit to the United States Department of Agriculture. (GA 51, 52 [GX 61, 62]).

* Curiously, in both 1974 and 1975, there were a few cashiers checks matching Lane's purported deposits that were actually purchased at the National Bank of Westchester, on or about the time the deposits were due. They were never deposited to the Federal Reserve Bank. The Government has since recovered those checks from Lane's attorney who got them from "a client." (Tr. 1780).

B. The Defense Case

The defense offered no evidence.

ARGUMENT**POINT I****Evidence of the Events Surrounding the March 21, 1974, Robbery were Properly Admitted.**

Lane argues that evidence of the events surrounding the March 21, 1974, robbery of Lane Check Cashing should have been excluded because it served to show only Lane's criminal propensity or disposition to steal, was not proved by "clear and convincing" evidence, and, in any event, was cumulative, confusing and unfairly prejudicial. Further, he contends that the trial judge should have provided a hearing to determine whether certain statements of Lane made to Detective Avery prior to any warning as to Lane's rights were subject to exclusion under *Miranda v. Arizona*, 384 U.S. 436 (1966).

A. The evidence was entirely relevant for purposes other than merely showing Lane's criminal character or disposition.

During the course of the trial, the Government adduced testimony and documentary evidence of the day-to-day conduct of Lane's check cashing operations to establish, first, that Lane personally was in constant contact with the business and intimately aware of and responsible for what went on there; and second, to show that what went on there was not the result of merely negligent or sloppy bookkeeping, but was, instead, calculated chaos designed to conceal the true nature of his business transactions. Clearly relevant to the tax evasion counts in the

Indictment under the theory described in *Spies v. United States*, 317 U.S. 492, 499 (1943), this evidence was also directly relevant with respect to the embezzlement count in the Indictment. In particular, the proof regarding the "dummy figure" and Lane's withdrawal of cash from the drawer where the food stamp money was commingled with the rest of the funds on hand, was directly probative of the manner in which Lane, personally, removed the food stamp money from the business.

The defense, during cross-examination of Government witnesses on these subjects, sought to elicit evidence that Lane was not in attendance at the business, knew little if anything about the daily operations of the business, that it was the employees who had the opportunity to take money from the store, and that, even if unorthodox, the "dummy figure" was merely an innocent device to protect the cashiers and to keep track of the money Lane borrowed, all of which the defense contended, he paid back. (See, e.g., Tr. 272-74, 288-90, 292-93, 322-26, 348, 435, 544-45, 570, 650-52). Indeed, these propositions were the basis for most of defense attorney's summation. (See, e.g., Tr. 1629-30, 1637, 1639, 1640, 1643, 1652).

Against this backdrop the Government offered evidence of Lane's behavior on the occasion of the March 21, 1974, robbery. What the Government adduced through this evidence was that Lane, far from being ignorant of the day-to-day operations of the business, knew exactly what the closing and opening cash figure was on a day certain. This was demonstrated by his repeated directions on the telephone to the cashier, and assertions directly to Detective Avery, that \$23,000 had been taken. Also adduced was Lane's own admission, after he was confronted with the fact that the officer knew the truth, that he utilized a "dummy figure" in his Lane Check Cashing records, and that he used the money he took for personal purposes and for expenses of his other corporations. The Government contended that this evidence was part and

parcel of its direct case, directly probative of Lane's intent and knowledge in connection with the tax evasion and embezzlement counts, without reference to the doctrine of "similar acts."

Of course, inextricably involved in this event was the fact that Lane made false statements to the police in an obvious plan to use the "dummy figure" to defraud the insurance company. But, far from rendering the whole incident inadmissible, the false statements were independently admissible pursuant to Fed. R. Evid. 404(b). They concerned a matter intricately connected with the same business—and the same device—through which the Government asserted that Lane converted food stamp monies, and then filed false statements in an effort to conceal the embezzlement. As such, the false statements to Detective Avery were admissible as similar acts that were highly probative of wilfulness and intent. See, e.g., *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Kaufman*, 453 F.2d 306, 310-11 (2d Cir. 1971); *United States v. Sweig*, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

Indeed, the whole incident not only tended to negate the defense of negligence, ignorance or employee trickery in the signing of the false Form 250 reports, it also tended to negate the defense of inadvertence with respect to Lane's tax problems and the claim of innocence with respect to the "dummy figure."

Thus, the events surrounding the March 21, 1974, robbery were offered and received for a purpose other than to show a bad character and as such were clearly admissible. *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United*

States v. Williams, 470 F.2d 915 (2d Cir. 1972).^{*} Indeed, the relevance of the evidence in this case was very similar to evidence admitted in *United States v. Erb*, 543 F.2d 438, 442 (2d Cir.), *cert. denied*, 429 U.S. 981 (1976), in which this Court noted that "cryptic references to other schemes were not so inflammatory that the likelihood of prejudice outweighed the probative value of the conversation."

B. Lane's statement was not excludable under *Miranda v. Arizona*, nor was Judge Haight required to hold a hearing under the circumstances.

During the middle of trial—indeed, after Detective Avery was called as a witness—Lane for the first time claimed that a hearing was necessary to determine whether proper *Miranda* warnings were given. (Tr. 664; GA 5). The prosecutor, after consulting with Avery, made a specific offer of proof concerning the circumstances under which the statement was made. The offer was never contested by Lane. On the basis of this offer of proof, and after researching the law, Judge Haight ruled that the statement was admissible. (Tr. 671-77; GA 12-18). His decision, and the procedures he adopted, were entirely correct.

First, of course, Lane made his motion to suppress far too late. F.R. Crim. P. 12(b)(3) specifically requires that all motions to suppress evidence be made prior to trial. As this Court noted in *United States v. Mauro*,

^{*} Appellant's contention that evidence of this event was not clear and convincing is absurd. In the first place, there is no such standard enunciated in this Circuit. In any event, the evidence consisted of the uncontroverted testimony of Detective Avery, a signed, sworn statement by Lane, and an insurance claim form, the admissibility of which Lane stipulated. (Tr. 731-32).

507 F.2d 802, 805-07 (2d Cir. 1974), *cert. denied*, 420 U.S. 991 (1975), this requirement is necessary in order to allow the Government to appeal an adverse ruling, and, of course, to insure orderly trial procedures. On this ground alone, Lane's claim should be rejected.*

Second, and more emphatically, the evidence clearly demonstrated that Lane's statements were not made in the "custodial" situation to which *Miranda* and its progeny apply. At the time he made the statements, Lane was not only not under arrest or detention of even the mildest sort, but was actually purporting to cooperate with the police by giving information, however false. As both the Supreme Court and this Court have noted, under facts considerably more coercive than those involved here, no warnings were required. *Beckwith v. United States*, 425 U.S. 341 (1976); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *United States v. Clark*, 525 F.2d 314 (2d Cir. 1975); *United States v. Hall*, 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970). Indeed, this case surely follows *a fortiori* from the decision in *Mathiason*, where the defendant was summoned to a police station for interrogation about a crime in which he was implicated, kept alone in a police room for half an hour, and was falsely told by the interrogating

* Lane's attorney at trial attempted to explain the lateness of his motion by asserting that he assumed that *Miranda* rights were given, and did not think of making a motion until he saw the 3500 material during trial. (Tr. 664-65). This argument, of course, would render Rule 12(b)(3) a nullity. Particularly in view of the extensive discovery rights accorded defendants by F.R. Crim. 16(a)(1)(A), the defendant clearly has the burden of determining whether or not he contests the validity of *Miranda* rights in advance of trial. In particular, in this case Lane received a copy of his written statement months before trial.

officer that his fingerprints were found at the scene of the crime.*

Furthermore, Lane was apparently engaged in the commission of a crime when he made the pre-warning statements to Detective Avery about the missing \$23,000. *Miranda* warnings are not required on such an occasion. See *United States v. Gentile*, 525 F.2d 252, 259 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

C. The trial judge correctly exercised his discretion pursuant to Fed. R. Evid. 403 in admitting the evidence.

The evidence of this event was offered through one short witness (Dollan would have been called in any event) in a two and one-half week trial involving some 25 witnesses and hundreds of documents. It can hardly be said to have been a waste of time, or to have unduly delayed the trial or confused the basic thrust of the case in the jury's mind. Also, Lane's own admissions during this incident concerning the "dummy figure" can hardly be called "cumulative."

Further, the only element of the incident that was remotely prejudicial were the false statements to the police. False statements are not of an inflammatory nature, likely to arouse irrational passions in the jury. See, e.g., *United States v. Kaufman*, *supra*, 453 F.2d at

* Particularly in view of Lane's extraordinarily tardy motion in this regard Judge Haight's decision to rely upon the factual offer of proof by the prosecutor was entirely reasonable. Lane, of course, did not contest the accuracy of that offer of facts, but merely argued (erroneously) that different legal conclusions flowed from it. Finally, of course, when Detective Avery testified, his testimony entirely supported the prosecutor's offer of proof. Lane did not renew his motion after Avery's testimony.

311. The trial judge meticulously charged the jury as to the limited use of the proof, both immediately after its admission and again in the main charge to the jury at the end of the case. (A. 43-46; GA 19-20).

In this context, the probative value of the entire incident outweighed the possible prejudice to Lane and any improbable negative effect on the conduct of the trial. As this Court has recently had occasion to reaffirm, en banc, a trial judge's exercise of discretion in this area will be reversed on appeal only if it is "arbitrary" or "irrational". *United States v. Robinson*, Dkt. No. 76-1153, slip. op. 5021, 5030 (2d Cir., July 28, 1977). Indeed, with specific reference to the admission of similar act evidence, this Court has stated, per Friendly, J., "the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." *United States v. Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). Judge Haight certainly did not abuse his discretion in this case.

POINT II

The Trial Court Correctly Denied the Motions to Sever Counts in the Indictment.

According to Lane, there should have been at least three trials in this matter, not one. Under his view of the law, he was entitled to a separate trial on the embezzlement count; another trial on the false statement counts; and a third trial on the tax evasion counts. This view is wrong.*

* Judge Haight properly gave this argument short shift in a written memorandum opinion denying severance. (GA 12)).

Rule 8(a) of the Federal Rules of Criminal Procedure permits joinder in the same indictment of offenses of the same or similar character, or of offenses based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

In this case, as the overall evidence adduced at trial manifestly demonstrated, the false statement charges were inseparable from the embezzlement charge. The embezzlement was the motive for the false statements, the false statements were the device the defendant used to cover-up the embezzlement. No serious argument can be advanced that these crimes were not integral parts of a common scheme to take food stamp monies. If severed, precisely the same evidence offered at one trial would not only have been admissible at the second trial, but would have been essential at both trials.

Much of the evidence offered pursuant to the embezzlement count to demonstrate that it was the defendant who embezzled the money and how he embezzled it was focused on the deliberate, deceitful way in which Lane conducted his business, and in particular the way in which he siphoned off unrecorded cash and commingled his funds. It was precisely upon this evidence of false Daily Transaction Sheets, of unorthodox and false book-keeping entries and the commingling of corporate funds, that the Government relied to demonstrate the affirmative acts of evasion necessary to demonstrate the element of wilful fraud in the charges of tax evasion. Certainly this evidence would have been repeated in a separate trial of the income tax evasion charges. Further, Count 26, the 1974 income tax evasion charge, was based entirely upon the specific item of the \$376,000 embezzled by Lane from the food stamp program that year. In short, since the same evidence would have been admitted at separate

trials, Lane cannot claim any prejudice on appeal. *United States v. Turbide*, Dkt. No. 76-1533, slip op. 4341, 4357-58 (2d Cir., June 22, 1977); see also *United States v. DiGiovanni*, 544 F.2d 642, 644 (2d Cir. 1976) (burden of showing prejudice for misjoinder rests on the defendant).

Desperately, Lane's entire argument finally comes down to Count 24, the income tax evasion charge of 1972. It is uncontested that Lane was not yet in the food stamp business in 1972. But to argue that for this reason Count 24 should have been severed is to overlook the first prong of Rule 8(a), which permits joinder of offenses of the same or *similar* character. So similar are income tax evasion counts for successive years that evidence of the 1972 attempt to evade would have been admissible in any event in any trial of the 1973 and 1974 attempts to evade.

Lane has never suggested any concrete prejudice to him from the joinder, as required by Fed. R. Cr. P. 14. It would appear, then, that Lane had nothing to lose by joinder, and little to gain but time with his proposed severance.

Under the circumstances the trial judge was clearly correct when he ruled against severance in the interests of trial economy and convenience. *United States v. Adams*, 434 F.2d, 756, 759 (2d Cir. 1970). At the very least, his decision to try the counts together did not amount to an abuse of the broad discretion allowed trial judges on this issue. *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2833 (2d Cir., April 1st 1977); *United States v. Finkelstein*, 526, F.2d 517, 523 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), and cases there cited.

POINT III

Lane was Not Entitled to a Charge on a Lesser Included Offense.

A charge on a lesser offense is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the greater and lesser offenses. *Sansone v. United States*, 380 U.S. 343, 349-50 (1965). The standard of wilfulness for a tax evasion felony charge under § 7201, and a failure-to-file misdemeanor charge under § 7203 is the same. *United States v. Bishop*, 412 U.S. 346, 356 (1973). Thus, the only difference between a tax evasion felony charge under § 7201, and a failure-to-file misdemeanor charge under § 7203, are the affirmative acts of evasion the Government is required to prove under § 7201. *Spies v. United States*, *supra*, 317 U.S. at 497-99.

The Government's evidence of wilfulness in this case (under either § 7201 or § 7203) was identical to the Government's evidence of the affirmative acts of evasion required only under § 7201, to wit, the manner in which Lane operated his businesses to conceal the true nature of his transactions. Since his failure to file tax returns in 1972, 1973 and 1974 was virtually conceded, the only factual issue was whether or not he had operated his businesses deliberately to conceal the true nature of his transactions.* Thus, exactly the same evidence—if be-

* Lane errs when he argues that there was a factual issue pertinent to this legal question by his assertion that the only reason the returns weren't filed was that the information necessary for the returns was not available. (Brief at 15). Indeed, this assertion is supported by neither a reference to the trial record nor a citation to legal authority. That proposition, if believed by the jury, would have required a finding of non-wilfulness—thus an acquittal—as surely on the lesser included charge as on the tax evasion charge.

lieved by the jury—would have served to convict on § 7201 or § 7203. Conversely, the jury could not have logically acquitted on § 7201 because of a failure to find affirmative acts of concealment, and still found a basis for wilfulness under § 7203.*

Under these circumstances, a lesser included offense instruction was not required, and indeed would have been improper. The Supreme Court held in *Sansone v. United States*, *supra*, 380 U.S. at 350, that “[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.” Furthermore, as this Court has noted, the test of whether a factual element is disputed is not merely that the jury could conceivably find the lesser but not the greater offense.

The mere fact that the jury was still free to disbelieve [a portion of testimony] does not elevate the issue to a truly “disputed” one; in the language of the Model Penal Code § 1.07(5) (1962), it does not provide “a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.”

United States v. Markis, 352 F.2d 860, 867 (2d Cir. 1965), *vacated on other grounds*, 387 U.S. 425 (1967). See also *United States v. Harary*, 457 F.2d 471, 477-78

* Significantly, Lane in summation sought to focus the jury's attention on the credibility of the Government's witnesses (Tr. 1368) and to demonstrate that Lane's actions were not those of a man acting wilfully. (Tr. 1331-34; 1647-52; 1653-57). He made no attempt to focus the jury's attention on the element of “an affirmative act constituting an evasion or attempted evasion of the tax,” which, under *Spies v. United States*, *supra*, and *Sansone v. United States*, *supra*, is the sole factor differentiating a violation of § 7201 from a violation of § 7203.

(2d Cir. 1972). In the context of this case, there was simply no "rational basis" for the jury to convict Lane on a violation of 26 U.S.C. § 7203 and yet acquit him of violating § 7201. Thus, Judge Haight properly denied the requested charge.

POINT IV

The Prosecutor's Rebuttal Remark was Entirely Proper.

From a two hour summation and a twenty minute rebuttal summation, Lane has picked one phrase, from one sentence, to attack, claiming that the remark prejudiced the entire case against him. The prosecutor said:

"First of all, I would just want to say remember that what you are dealing with here is evidence in this case, evidence that you have heard from that witness stand and evidence and documents that are marked in evidence, not the imaginations of either myself or Mr. Herold [defense attorney] with respect to what could have been said, what might have been said, *what may be out there in documents someplace that have not been brought into this courtroom by the defense case here.*" (Emphasis Lane's).

Lane's claim is frivolous.

Even standing alone, this vague, innocuous remark about the lack of defense documents was clearly within the bounds of fair comment proscribed in this Circuit. It was not of "such a nature that a jury would naturally and necessarily construe it to be directed to the failure of the defendant to testify." See, e.g., *United States v. Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), *cert. denied*, — U.S. — (1977); *United States v. Lipton*,

467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). Indeed, far from pointing to the lack of live testimony of any kind, the remark explicitly referred to documents. In addition, of course, the remark simply reminded the jury that they should consider only the evidence before them, *not* hypothetical other evidence.* Lane's complaint about this is mystifying.

Lane argues that the comment about evidence not produced by the defense improperly told the trial jury that the appellant had a burden of proving something, and that the failure to produce evidence should be considered by the jury. Even if that were the import of the remark—which it was not—there was nothing improper about it, particularly in the context of the net worth tax evasion case the Government had just presented to the jury. In a net worth case, once the Government has established that it has negated every lead offered as to nontaxable income, and established every element of the offense, “the defendant remains quiet at his peril.” *Holland v. United States*, 348 U.S. 121, 138-39 (1954). The burden does shift to the taxpayer to explain the remaining excess. *United States v. Slutsky*, 487 F.2d 832, 840 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974).

Finally, whatever the effect of the remark, the trial judge clearly and unequivocally explained to the jury in his charge that: 1) the defendant had an absolute right not to testify and that the jury could not use his failure to do so against him (Tr. 1682); and 2) the burden of proof was upon the Government, and the defendant could rest on the presumption of innocence and not put in any evidence at all. (Tr. 1683). The judge

* Characteristically, while Lane underscores that portion of the summation he believes was prejudicial, he does not underscore the word “not,” which clearly showed that the prosecutor was eschewing the very argument Lane asserts she embraced.

stressed again, in discussing the tax evasion counts, that the burden was always on the Government to establish beyond a reasonable doubt that the increases in net worth were from taxable sources, and that while the jury could consider the defendant's failure to explain increases in his net worth as part of the circumstances in the case, the law never imposed upon a defendant in a criminal case the burden or duty of providing any evidence. (Tr. 1706-07). Particularly in the context of this eminently fair charge—to which Lane makes absolutely no claim of error—Lane's assertion is meritless.

POINT V

The Rule 29 and Rule 33 Motions were Frivolous and the Trial Judge Correctly Denied Each.

A. The Rule 29 Motion.

The test of evidentiary sufficiency to be applied in this Circuit by the trial judge under Rule 29 was established in *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). While *Taylor* concerned the standard applicable to warrant submission of the case to the jury, the *Taylor* rule is just as applicable to Rule 29 motions made after the jury returns a guilty verdict. See, e.g., *United States v. DeGarces*, 518 F.2d 1156, 1158-59 (2d Cir. 1975).

In applying this test, the trial court must "take that view of the evidence which is most favorable to the government; must give to the government the benefit of all the inferences which reasonably may be drawn from the evidence; and must refrain from concerning itself with the credibility of witnesses and the weight of the evidence." *United States v. Toner*, 77 F. Supp. 908, 910 (E.D. Pa. 1948). See, e.g., *United States v. Hawley*, 554 F.2d 50, 52 (2d Cir. 1977); *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir.), *cert. denied*,

419 U.S. 1079 (1974); *United States v. Zive*, 311 F. Supp. 857, 859 (S.D.N.Y. 1970); *United States v. Gross*, 375 F. Supp. 971, 973 (D.N.J. 1974), *aff'd*, 511 F.2d 910 (3d Cir. 1974), *cert. denied*, 423 U.S. 924 (1975). Cf. *United States v. Weinstein*, 452 F.2d 704, 713 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). "The verdict of the jury must be sustained if there is substantial evidence . . . to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942).

It is against this standard that the trial judge measured his ruling at the close of the Government's direct evidence in this case; and, after the defense rested without presenting evidence, it is upon this test that he sent the case to the jury. At each of those junctures, Lane made, among others, the same arguments he has made here. The trial judge rejected those arguments at the end of the Government's case. Then, Lane made the same arguments to the jury in summation. The jury rejected them. Lane then made them again in post-trial motions. The trial judge, again, denied each and every one. (GA 21-26).

Lane persists even in this Court with the argument that the Government's proof failed to show a nexus between the food stamp monies embezzled and Lane himself. This position flies in the face of overwhelming evidence to the contrary. It was uncontested that Lane was president and sole shareholder of Lane Check Cashing, Inc. A parade of employee witnesses spanning a time period from 1972 through 1975, took the stand and testified about his or her contact with Harold Lane in the course of the business day. Lane adjusted the "dummy figure," Lane brought in money from the bank, Lane took out money from the cash drawer, Lane moved emergency cash from place to place, Lane dealt with the examiners from the State Banking Department, Lane emptied "Harold's Box" of "Harold's Dimes," Lane told Stuart Scherer how to cheat customers, Lane told Mattie

Grady to destroy the tapes reflecting the excess check cashing fees. There was no evidence to support any suggestion that he was not in day-to-day control of his business.

Further, the uncontroverted evidence was that when Mattie Grady was preparing the Form 250 reports and the Federal Reserve Bank deposit tickets for the food stamp monies, she gave them or left them for Harold Lane. Thereafter, the evidence was clear, Harold Lane received the Form 250 reports. It was uncontested that he signed them. The entirely rational inference was that he received the deposit tickets as well. The uncontroverted evidence was that the deposits were not made with the Federal Reserve Bank. Of course, commencing in September 1974 through October of 1975, Lane made out the Form 250 reports himself as well as signing each, and there is no evidence that he even bothered to make out the deposit tickets. It is uncontroverted that no deposits were made during this period of time.

The Government's evidence in this case was in part circumstantial. But in spite of the distinction Lane attempted to make before the trial judge between circumstantial evidence and direct evidence, the judge correctly said, when he ruled at the end of the Government's case (Tr. 1507-08):

The law teaches that [circumstantial evidence] is of equal value to direct. Certain crimes—and intent—must be proved by circumstantial rather than direct evidence. I am satisfied that there is a sufficient combination to send the case to the jury.

See, e.g., *United States v. Glasser*, 443 F.2d 994, 1006-07 (2d Cir.), cert. denied, 404 U.S. 854 (1971). Further, the law does not require, as Lane persists in arguing, that such evidence exclude every other hypothesis but that of guilt.* See, e.g., *United States v. Taylor*, supra, 464

F.2d at 244. *United States v. Fiore*, 467 F.2d 86, 88 (2d Cir. 1972).**

Indeed, this case surely follows *a fortiori* from numerous decisions of this Court finding sufficient evidence that was far less compelling than the evidence here. See, e.g., *United States v. Hanlon*, 548 F.2d 1096, 1100 (2d Cir. 1977) (in the context of a complicated fraud scheme, "[t]here was evidence that [the appellant] Katritsis was a confidant of Amanatides and did his 'personal' typing, despite his limitation to a 'hunt and peck' technique. It was reasonable for the jury to infer knowledge of Amanatides' criminal scheme from this."); *United States v. Erb*, *supra*, 543 F.2d at 446. All of the other issues raised by Lane in his motion involved issues of fact which were totally within the province of the jury to decide. The jury resoundingly resolved these issues against him. There was no basis in fact or law for the trial judge to reverse the jury's verdict.

B. The Rule 33 Motion.

Lane based the first branch of his post-trial motion for a new trial pursuant to F. R. Crim. P. 33 on six alleged trial errors of the court. He apparently abandons

* As this Court has stated, in reaffirming that doctrine. "[t]he prosecution . . . is under no duty to negate all possible innocent inferences from a set of circumstantial facts where, as here, the jury could easily have properly inferred guilty possession from those same facts." *United States v. Singleton*, 532 F.2d 199, 203 (2d Cir. 1976).

** In any event, the trial judge gave the "equal inferences" charge to the jury (Tr. 1715-16), over the Government's later objection. (Tr. 1722). In this respect Lane was treated far better than the law allows, since this Court has specifically noted that the instruction should not be given. *United States v. Pfingst*, 477 F.2d 177, 197 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States v. Grunberger*, 431 F.2d 1062, 1066 (2d Cir. 1970).

all but the following before this Court: 1) the denial of his Rule 29(a) motion; 2) the admission of evidence of the March 21, 1974, robbery, and Lane's efforts to use the "dummy figure" as the true amount of cash taken; 3) the trial court's refusal to charge the jury on the lesser included § 7203 violation of the tax laws. In short, Lane's present appeal from the denial of the Rule 33 motion is simply a repackaging of his other substantive claims on appeal. As indicated in this brief, those arguments are wholly without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JO ANN HARRIS,
AUDREY STRAUSS,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

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714-017-649

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